

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPREME JUDICIAL COURT
No.

APPEALS COURT
No. 2023-P-0050

COMMONWEALTH

v.

KEVIN TYNAN

**DEFENDANT'S APPLICATION FOR
DIRECT APPELLATE REVIEW OF THE ORDERS OF THE
NORTHERN BERKSHIRE DISTRICT COURT**

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v.

KEVIN TYNAN

APPLICATION FOR DIRECT APPELLATE REVIEW

Defendant Kevin Tynan applies pursuant to Mass. R.A.P. 11 for direct appellate review of the order denying his motion to withdraw admissions to sufficient facts.

The defendant’s appeal raises the issue of whether demonstrably inaccurate advice that plea counsel affirmatively provided to the defendant on parole release—and that the defendant relied upon in tendering admissions—can constitute deficient performance in support of a claim of ineffective assistance of counsel.

The defendant in this case sought to withdraw his admissions to sufficient facts in these cases on the basis that his plea counsel provided inaccurate advice that he was “virtually certain to receive parole” after serving one-half of his house of correction sentence. In fact, the

governing regulations of the parole board established a “strong presumption against parole release” for the defendant due to out-of-state detainers filed against him. The defendant relied on this advice from plea counsel in deciding to tender admissions and to present a suggested disposition formulated by plea counsel to the court.

In denying the defendant’s motion to withdraw his admissions, the plea judge relied on decisional law of the Appeals Court for the proposition that inaccurate or mistaken advice on parole release cannot constitute deficient performance of counsel because parole is a collateral consequence of the plea on which counsel need not advise. By this reasoning, advice on parole is categorically excluded from scrutiny as violating the right to effective assistance of counsel, no matter if the advice was affirmatively provided, demonstrably inaccurate, and relied upon by the defendant in deciding to plead guilty. Numerous federal courts of appeal and state appellate courts, however, have concluded otherwise. These courts have drawn a distinction between the failure to advise a defendant on parole and collateral consequences of a plea—which does not constitute ineffective assistance of counsel—and inaccurate advice affirmatively provided by plea counsel on parole and

collateral consequences—which may constitute ineffective assistance of counsel. These courts have held that plea counsel may be ineffective where counsel affirmatively provides inaccurate advice on a direct or collateral consequence, the defendant relies on that advice in deciding to change his plea, and the defendant is prejudiced by that reliance. Accordingly, it appears that courts in Massachusetts have been defining the right to counsel to be less protective than a number of federal and state appellate courts in this specific context. For this reason, this appeal presents an opportunity to ensure that courts in Massachusetts are properly protecting the right to effective assistance of counsel enshrined in the federal and state constitutions.

As further support for his Application, the Defendant relies upon the attached Memorandum of Law.

Respectfully submitted,

KEVIN TYNAN,

By his attorney:



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Dated: March 21, 2023.

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPREME JUDICIAL COURT
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MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR
DIRECT APPELLATE REVIEW

I. STATEMENT OF PRIOR PROCEEDINGS

The defendant, Kevin Tynan, was charged by complaint with two counts of breaking and entering into a building with intent to commit a felony, in violation of G.L. c. 266, § 16, and four counts of vandalism, in violation of G.L. c. 266, § 126A; and one count of larceny from a building, in violation of G.L. c. 266, § 20.¹ Add:1, 6.² Mr. Tynan was arraigned on December 18, 2019. Add:1, 6.

¹ Because the offenses were alleged to have occurred on different dates, these offenses were charged in two criminal complaints, numbered 1928CR000118 and 1928CR000119, respectively.

² Citations to the addendum filed with this application are identified as Add:[Page]; and citations to the appendix filed in the trial court with the motion to withdraw admissions are identified as Appx:[Page].

On February 28, 2020, Mr. Tynan tendered admissions to sufficient facts as to all counts charged in the two complaints. Add:2, 7-8. Mr. Tynan's plea counsel recommended a split sentence of two and one-half years in the house of correction, eighteen months to be served, with the balance suspended for two years as to one of the charges of breaking and entering into a building. Appx:227. Plea counsel recommended that the remaining charges in the two complaints be filed without a finding. Appx:224, 227. The plea judge accepted the admissions but only imposed a sentence of eighteen months in the house of correction on one count of breaking and entering in a building and one count of larceny from a building. Add:2, 7-8. The judge continued without a finding the remainder of the counts in the two complaints for a period of eighteen months. Add:2, 7-8.

On May 31, 2022, Mr. Tynan filed a motion to withdraw his admissions on both dockets, asserting that he had received ineffective assistance of his plea counsel. Add:4, 10. The court held a non-evidentiary hearing on the motion on September 21, 2022. Add:4, 10. On November 21, 2022, the hearing judge denied the motion by a written memorandum and order. Add:4, 10, 12-18.

The defendant filed a notice of appeal on November 28, 2022.
Add:5, 10. This appeal entered in the Appeals Court on January 17,
2023.

II. FACTS RELEVANT TO THE APPEAL

The charges underlying this appeal arose from two alleged break-ins at the Clarksburg Elementary School in Clarksburg, Massachusetts on November 11 and 19, 2018. Appx:20, 25. While investigating these break-ins, police learned of similar break-ins that had occurred in nearby schools in New York and Vermont. Appx:25-26, 43-48. In one of those break-ins, a Buick sedan was observed in the area around the time of the break-in. Appx:48. That Buick was registered to Mr. Tynan's brother at an address in North Adams. Appx:48. Members of the North Adams police department obtained a search warrant on November 21, 2018, to monitor the data from a global positioning system (GPS) device they intended to install on the Buick. Appx:31-32. In an attempt to install a GPS device on the Buick, the police identified at least three different addresses associated with Mr. Tynan but did not locate the Buick at any of them. Appx:48. A return filed on December 4, 2018, asserted that the search warrant had not been executed because police had not been able to locate the Buick to install the GPS device. Appx:33.

On December 3, 2018, North Adams police learned of a break-in that occurred the previous day in Vermont. Appx:71. Police also learned

that the same Buick registered to Mr. Tynan's brother had been parked in the school's parking lot in the early morning hours of December 2, 2018. Appx:71-72. On December 3, 2018, a North Adam Police officer located the Buick in a garage in the backyard of 27 Wall Street in North Adams. Appx:74. 27 Wall Street is a three-family residence with a driveway that runs from Wall Street along the side of the residence into the backyard. Appx:74, 271, 275. In the backyard, there is a paved area and a multi-bay garage with bays assigned to the units within 27 Wall Street. Appx:271, 283, 285, 298. A North Adams police officer located the Buick by walking from Wall Street up the driveway into the backyard and shining a flashlight through windows on the garage bay doors. Appx:74, 271. Using these observations, North Adams police then obtained two search warrants: one to enter the garage at 27 Wall Street to install the GPS device on the Buick and a second to monitor the data received from the GPS device. Appx:52-53, 81-82. Police reentered the garage and installed a GPS device on the Buick in the early morning hours of December 5, 2018. Appx:54, 132.

For the next ten days, police utilized the GPS device to log the whereabouts and conduct in-person surveillance of the Buick. Appx:133-

135. During the early morning of December 15, 2018, North Adams police, using the GPS device, became aware that the Buick had left 27 Wall Street. Appx:135. North Adams police officers began to follow the Buick's path of travel, until the Buick stopped in New York. Appx:135. After the Buick stopped, North Adams police called local New York police to advise them of a potential break-in in progress. Appx:135. Mr. Tynan was arrested by New York police. Appx:26, 136. A search of the Buick uncovered property related to one of the prior break-ins in Vermont. Appx:26, 136. North Adams police, using the information derived from the GPS device, obtained additional search warrants to search Mr. Tynan's residence at 27 Wall Street and electronic devices recovered therein. Appx:110-111, 144-145, 184-185.

Mr. Tynan was taken into custody in New York and was held in New York due to criminal charges there. Appx:27, 263-264. Mr. Tynan was later transported to Massachusetts to face the charges alleged in these complaints. Appx:264-265. After he arrived in Massachusetts, detainers were filed against Mr. Tynan by the state of Vermont for criminal charges pending in that state. Appx:264-265.

Mr. Tynan was represented by retained counsel on these cases. Appx:263, 296. Mr. Tynan's counsel advised him to tender admissions to sufficient facts and formulated a proposed disposition to present to the court. Appx:266-267, 296, 299. This proposed disposition revolved around Mr. Tynan completing the Residential Substance Abuse Treatment (RSAT) program offered in the Berkshire County House of Correction. Appx:264, 266-267. Because plea counsel believed the program to require at least a nine-month committed sentence and because plea counsel understood that Mr. Tynan was "virtually certain to receive parole" after one-half of his custodial sentence, she proposed a split sentence with eighteen months to be served in the house of correction. Appx:266-267. In explaining the basis for her proposed disposition, plea counsel advised Mr. Tynan that he was "virtually certain to receive parole" after serving one-half of his custodial sentence. Appx:266-267. Mr. Tynan expressed concern that he would be denied parole, and plea counsel told him that being denied parole was not something he had to worry about. Appx:299-300.

Prior to advising Mr. Tynan to tender admissions and present the sentencing recommendation, plea counsel did not discuss the possibility

of taking the cases to trial or litigating pre-trial motions. Appx:266. The application for complaint filed in one of these cases referenced placing a GPS device on the Buick pursuant to a search warrant, a search by New York police pursuant to a search warrant, and multiple searches of Mr. Tynan's apartment pursuant to a warrant. Appx:26, 28-29. At no time prior to Mr. Tynan's change of plea did plea counsel obtain or review any search warrants associated with this case. Appx:266.

Approximately two and one-half months after his arraignment, on February 28, 2020, Mr. Tynan followed the advice of plea counsel and tendered admissions to sufficient facts as to all counts charged in the two complaints. Appx:224-228, 296. On sentencing, plea counsel proposed the sentencing recommendation she had developed. Appx:224, 227. The judge accepted Mr. Tynan's admissions but rejected plea counsel's sentencing recommendation. Appx:224, 227. The judge stated that he would only sentence Mr. Tynan to eighteen months in the house of correction, which he indicated was "a pretty significant sentence for these crimes." Appx:239-240.

During his incarceration, Mr. Tynan requested and was denied release on parole. Appx:252, 300. In denying Mr. Tynan's release on

parole, the parole board referenced his active warrants in Vermont in concluding that he did not meet the legal standard for release.

Appx:252.

III. ISSUES OF LAW RAISED BY THE APPEAL

1. Whether demonstrably inaccurate advice on parole release can constitute deficient performance for the purpose of establishing ineffective assistance of plea counsel where the defendant relies on the inaccurate advice in deciding to plead guilty and is prejudiced by that reliance?
2. Whether plea counsel was ineffective for failing to investigate or advise the defendant regarding a viable motion to suppress based on a warrantless entry onto private property that enabled police to install a GPS device and use that device to collect evidence against the Defendant?

These issues are preserved for the Court's review. Both issues were explicitly raised in Mr. Tynan's first motion to withdraw his admissions to sufficient facts. The motion judge denied the motion in a written memorandum and order. Mr. Tynan timely appealed from that order.

IV. ARGUMENT

1. Demonstrably inaccurate advice on parole release can constitute deficient performance to support a claim of ineffective assistance of counsel where the defendant relies on that advice in deciding to plead guilty.

Plea counsel in this case affirmatively provided demonstrably inaccurate advice on parole release. Mr. Tynan relied on this advice in deciding to change his plea. Whether providing advice about a direct or collateral consequence of a plea, a defendant is entitled to rely on plea counsel to provide accurate advice or to decline to provide specific advice when plea counsel is not reasonably certain of the accuracy of the advice in question. Where plea counsel affirmatively provides inaccurate advice, a defendant relies upon that advice in deciding to plead guilty, and the defendant is prejudiced by that reliance, the defendant has been deprived of his constitutional right to effective assistance of counsel.

In this case, plea counsel formulated a sentencing recommendation that was expressly premised on Mr. Tynan being released on parole after serving one-half of his house of corrections sentence. Appx:266-267. Plea counsel told Mr. Tynan that he was “virtually certain to receive parole.” Appx:267. When Mr. Tynan

expressed concern about the length of the custodial portion of the sentencing recommendation and about the possibility that he might be denied parole, plea counsel told him that he did not have to worry about being denied parole. Appx:299-300. Contrary to plea counsel's advice, however, the regulations governing release on parole established a "strong presumption against parole release" for inmates, like Mr. Tynan, who had detainers filed against them for pending criminal charges. 120 CMR 300.04(2). Plea counsel was aware of these detainers. Appx:264-265. Plea counsel's advice simply did not reflect the application of these regulations to Mr. Tynan.

The key distinction in this appeal is between a failure of counsel to advise defendants on collateral matters and affirmative misadvice—that is, inaccurate advice actually provided to a defendant in the course of advising whether to plead guilty. The law is clear that plea counsel does not need to provide any advice on a collateral consequence of a plea in order to provide effective assistance during plea bargaining. See Commonwealth v. Sylvester, 476 Mass. 1, 6 (2016). There does not appear to be any Massachusetts appellate case, however, establishing that affirmative misadvice on a material issue, whether the issue is

considered a direct or collateral consequence of a plea, may constitute deficient performance where a defendant relies upon that advice in deciding to plead guilty.³

The motion judge, and the Commonwealth whose analysis the motion judge adopted, concluded that affirmative misadvice regarding parole cannot constitute ineffective assistance of counsel because parole release is a collateral consequence of a plea. Add:16. For this proposition, the court and the Commonwealth cited Commonwealth v. Indelicato, 40 Mass. App. Ct. 944, 945 (1996). Add:16. The court in Indelicato held that “misleading” advice “as to a collateral consequence of the plea, d[id] not amount to a failing that was ‘grave and fundamental’” such that counsel could “be regarded as having been ‘seriously incompetent, ineffective, or inattentive [as measured by] that which might be expected from an ordinary, fallible lawyer.’” 40 Mass. App. Ct. at 945 (quotations omitted).

³ Because immigration consequences have a “unique nature” that precludes such consequences from being considered collateral to a conviction, precedents regarding advice on immigration consequences do not establish that affirmative misadvice generally may constitute deficient performance. See Commonwealth v. Sylvester, 476 Mass. 1, 6-7 & n.8 (2016)

That proposition, and substantially identical ones, has been repeatedly articulated by Massachusetts courts in the years following that decision. See Commonwealth v. Minon, 102 Mass. App. Ct. 244, 247 (2023), citing Commonwealth v. Henry, 488 Mass. 484, 497 (2021) (“Advice as to collateral consequences, however, has been considered outside the ambit of the right to the effective assistance of counsel.”); Commonwealth v. Najjar, 96 Mass. App. Ct. 569, 586 (2019) (Kinder, J. dissenting) (dissent citing Indelicato for proposition that “defense counsel’s mistaken advice as to penal consequences of plea does not render plea involuntary and unintelligent”); Commonwealth v. Lenkowski, 84 Mass. App. Ct. 1121 (2013) (unpublished op. at *4-*5), (citing Indelicato for proposition that counsel not ineffective for providing inaccurate advice about conviction’s effect on firearms licensure); Commonwealth v. DeLorenzo, 76 Mass. App. Ct. 1130 (2010) (unpublished op. at *5) (citing Indelicato for proposition that mistaken or incomplete advice regarding parole eligibility regards only collateral issue to conviction).

Accordingly, Massachusetts courts appear to regularly express the proposition that affirmative misadvice on any matter considered to be

collateral cannot constitute deficient performance of counsel. If this proposition is an accurate expression of Massachusetts law, it places Massachusetts at odds with a majority of federal circuit courts of appeal and the appellate courts of a number of other states. The First Circuit Court of Appeals has explicated the basis for distinguishing affirmative misadvice from the failure to advise a client on collateral consequences:

If an attorney takes it upon himself to advise a client about a material matter, thereby suggesting that he knows what he is talking about, but then provides incorrect advice, the client should be able to bring an ineffective assistance of counsel claim regardless of whether the matter was of a collateral nature.

United States v. Castro-Taveras, 841 F.3d 34, 50 n.13 (1st Cir. 2016).

This articulation by the First Circuit appears to be the majority position among the federal circuits. See Meyers v. Gillis, 142 F.3d 664, 667-668 (3d Cir. 1998) (concluding defendant received ineffective assistance when counsel provided incorrect advice on parole eligibility); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir. 1990) (en banc) (holding “erroneous parole-eligibility advice” to constitute ineffective assistance of counsel); Holmes v. United States, 876 F.2d 1545, 1552 & n.8 (11th Cir. 1989) (adopting reasoning of Fourth Circuit in Strader, *infra*); Sparks v. Sowders, 852 F.2d 882, 885 (6th Cir. 1988) (holding that

“gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel”); Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979) (holding that when defendant is “grossly misinformed about [parole eligibility] by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel”); see generally Padilla v. Kentucky, 559 U.S. 356, 387 (2010) (Alito, J., concurring) (“[I]t appears that no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can never give rise to ineffective assistance.”).

Similarly, a number of state appellate courts have determined the right to effective assistance counsel under the Sixth and Fourteenth Amendments or cognate state constitutional provisions may be violated where plea counsel provides affirmative misadvice on a collateral issue. For example, the New Hampshire Supreme Court held as a matter of state constitutional law that gross misinformation regarding a collateral consequence of a conviction—the effect on driver’s licensure in that case—can constitute deficient performance for the purposes of ineffective assistance where the defendant relies on that advice in deciding to plead guilty. State v. Sharkey, 155 N.H. 638, 641-643 (2007).

Other states have reached the same conclusion. See Goodall v. United States, 759 A.2d 1077, 1082 (D.C. 2000); Rollins v. State, 277 Ga. 488, 490 (2004); Meier v. State, 337 N.W.2d 204, 207 (Iowa 1983); State v. Ellis-Strong, 899 N.W.2d 531, 539 (Minn. Ct. App. 2017); Savage v. State, 114 S.W.3d 455, 458 (Mo. Ct. App. 2003); State v. Stowe, 71 Wash. App. 182, 187-188 (1993).

Accordingly, it appears that a majority of federal circuit courts of appeal and the appellate courts of a number of other states consider a defendant to have received ineffective assistance of counsel where plea counsel affirmatively provides inaccurate advice on a collateral consequence, the defendant relies on that advice, and the defendant is prejudiced by that reliance. The district court in this case, and Massachusetts appellate courts in other cases, have come to the opposite conclusion, exempting advice on collateral issues from scrutiny as ineffective assistance of counsel. The district court denied the defendant's motion on the basis that advice that the defendant was "virtually certain to receive parole" regarded only a collateral consequence. The defendant's motion to withdraw his admissions established that plea counsel told the defendant that he was "virtually

certain to receive parole” after serving one-half of his house of correction sentence, Appx:267; that this advice was inaccurate, 120 CMR 300.04(2); and that the defendant reasonably relied on this advice in deciding to change his plea. Appx:297-300. The district court should have proceeded to analyze whether Mr. Tynan relied on the advice and was prejudiced by that reliance, ordering an evidentiary hearing if necessary. The district court’s failure to do so was error. See Sharkey, 155 N.H. at 641-643.

This Court should grant this application to provide clear guidance to Massachusetts courts that the state and federal rights to effective assistance of counsel may be violated where counsel affirmatively provides inaccurate advice and a defendant relies on that advice, whether that advice regards a direct or collateral consequence of a plea.⁴

⁴ The scope of effective assistance articulated by federal courts in this context also gives rise to the possibility that Massachusetts courts have been impermissibly interpreting the state constitutional right to counsel as less protective than the right to counsel articulated in the Sixth Amendment. See Commonwealth v. Pearson, 486 Mass. 809, 814 (2021) (noting that application of state constitutional right may not be less protective than cognate federal constitutional right); see also Padilla v. Kentucky, 559 U.S. 356, 387 (2010) (Alito, J., concurring).

2. Plea counsel was ineffective for failing to investigate and advise the defendant regarding a viable motion to suppress the fruits of a warrantless entry onto the curtilage of a residence that allowed police to install a GPS device.

This appeal also raises the issue of whether plea counsel's failure to investigate and advise Mr. Tynan about a viable motion to suppress prior to advising him to change his plea constitutes ineffective assistance of counsel. The district court denied Mr. Tynan's motion to withdraw admissions, adopting the Commonwealth's reasoning that the potential motion was not meritorious and concluding that the evidence not implicated by the motion to suppress "would have been sufficient to allow these matters to proceed to trial." Add:15-16. The trial court's reasoning was flawed on a number of bases: it mistakenly imported a reasonable expectation of privacy analysis into the property-based privacy analysis explicated in Florida v. Jardines, 569 U.S. 1, 11 (2013), and Commonwealth v. Leslie, 477 Mass. 48, 56-57 (2017); it erroneously applied the plain view doctrine to a police trespass on private property, see Collins v. Virginia, 138 S. Ct. 1663, 1672 (2018); it erroneously applied the inevitable discovery doctrine where police filed an affidavit that they had been unable to locate the Buick for nearly two weeks prior to the unlawful entry, see Commonwealth v. Campbell, 475 Mass.

611, 622 (2016); and it inappropriately considered a subsequently obtained search warrant as an independent source of the evidence in question without considering whether the decision to seek the warrant was prompted by what police observed during the prior unlawful entry, see Commonwealth v. Pearson, 486 Mass. 809, 813 (2021)

Similarly, the judge's conclusion that the evidence not implicated by the motion to suppress "would have been sufficient to allow these matters to proceed to trial," Add:15-16, is not an appropriate basis to determine prejudice from ineffective assistance of counsel, see Commonwealth v. Clarke, 460 Mass. 30, 47 (2011); and did not take into account the proper scope of suppression where the unlawful entry enabled police to install a GPS device, see Commonwealth v. Fredericq, 482 Mass. 70, 78-79 (2019). This issue raises important questions of constitutional privacy rights, and the defendant requests direct appellate review on this issue as well.

V. REASONS DIRECT REVIEW IS APPROPRIATE

This appeal is appropriate for direct appellate review because it raises important questions of the scope of the right to counsel under the United States Constitution and the Massachusetts Declaration of Rights. In addition, this appeal raises questions of such public interest that justice requires a final determination by the full Supreme Judicial Court. The district court in this case and appellate courts in other cases have repeatedly concluded that advice regarding parole and collateral issues is excluded from scrutiny as ineffective assistance of counsel, even where counsel provides demonstrably inaccurate advice and a client relies on that advice in deciding to plead guilty. A decision from this Court is needed to provide guidance to the lower courts on the proper scope of the right to counsel under the federal and state constitutions. For these reasons, this Court should grant direct appellate review and reverse the judgment.

Respectfully submitted,

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Dated: March 21, 2023.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the applicable rules of appellate procedure, including, but not limited to: Rule 11(b) (contents of application for direct appellate review); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). Compliance with Mass. R.A.P. 11(b) was ascertained using the word count feature of Microsoft Word for Office 365. This Application for Direct Appellate Review has been produced using 14-point Century Schoolbook, a proportionally spaced font. The number of words in the argument section of the Application is 1,962.



Nicholas Matteson

CERTIFICATE OF SERVICE


I hereby certify, under pains and penalties of perjury, that I have on this date made service upon the Commonwealth by directing that a copy of this Application for Direct Appellate Review be electronically served on Assistant District Attorney Jennifer K. Zalnasky, by the Court's e-file protocol.



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Dated: March 21, 2023.

ADDENDUM

CRIMINAL DOCKET		DOCKET NUMBER 1928CR000118		NO. OF COUNTS 2	Trial Court of Massachusetts District Court Department		
DEFENDANT NAME AND ADDRESS Kevin M Tynan 52 Jackson Street North Adams, MA 01247			DOB 08/26/1981	GENDER Male	COURT NAME & ADDRESS Northern Berkshire District Court 111 Holden Street North Adams, MA 01247-0746		
			DATE COMPLAINT ISSUED 02/07/2019				
			PRECOMPLAINT ARREST DATE		INTERPRETER REQUIRED		
FIRST FIVE OFFENSE COUNTS							
COUNT	CODE	OFFENSE DESCRIPTION					OFFENSE DATE
1	266/16/A	B&E BUILDING NIGHTTIME FOR FELONY c266 §16					11/11/2018
2	266/126A	VANDALIZE PROPERTY c266 §126A					11/11/2018
DEFENSE ATTORNEY Flourney (B)			OFFENSE CITY/TOWN Clarksburg		POLICE DEPARTMENT CLARKSBURG PD		
DATE & JUDGE		DOCKET ENTRY			DATE & JUDGE		FEEES IMPOSED
12-18-19 Rota		<input type="checkbox"/> Attorney appointed (SJC R. 3:10) <input type="checkbox"/> Atty denied & Deft. Advised per 211 D §2A <input type="checkbox"/> Waiver of Counsel found after colloquy Terms of release set: <input type="checkbox"/> PR <input checked="" type="checkbox"/> Bail 1000/10000 <input type="checkbox"/> See Docket for special condition af <input type="checkbox"/> Held (276 §58A) pry					Counsel Fee (211D § 2A ¶2) <input type="checkbox"/> WAIVED
							Counsel Contribution (211D § 2) <input type="checkbox"/> WAIVED
							Default Warrant Fee (276 § 30 ¶1) <input type="checkbox"/> WAIVED
							Default Warrant Arrest Fee (276 § 30 ¶2) <input type="checkbox"/> WAIVED
12-18-19 Rota		Arraigned and advised: <input checked="" type="checkbox"/> Potential of bail revocation (276 §58B) <input type="checkbox"/> Right to bail to review (276 §58) <input type="checkbox"/> Right to drug exam (111E § 10) <input type="checkbox"/> Inquiry made by Court under 276 § 56A Abuse Allegation: <input type="checkbox"/> C276 § 56A form filed by Commonwealth <input type="checkbox"/> Allegation of abuse under C276 § 56A found <input type="checkbox"/> No allegation of abuse under C276 § 56A found					Probation Supervision Fee (276 § 87A) <input type="checkbox"/> WAIVED
							Bail Order Forfeited
							Advised of right to jury trial: <input type="checkbox"/> Waiver of jury found after colloquy <input type="checkbox"/> Does not waive
							Advised of trial rights as pro se (Dist. Ct. Supp.R.4)
							Advised of right of appeal to Appeals Ct. (M.R. Crim P.R. 28)
SCHEDULING HISTORY							
NO.	SCHEDULED DATE	EVENT	RESULT			JUDGE	TAPE START/ STOP
1	2/8/19	Warrant	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
2	12-18-19	Qhr	<input checked="" type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd			W. Rota	
3	1-10-20	PT	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
4	1-24-20	PT	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input checked="" type="checkbox"/> Cont'd			Verbal	
5	2-28-20		<input type="checkbox"/> Held <input checked="" type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd			Verbal	
6			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
7			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
8			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
9			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
10			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
APPROVED ABBREVIATIONS ARR = Arraignment PTH = Preliminary hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate DFTA = Defendant failed to appear & was defaulted WAR = Warrant issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing.							
A TRUE COPY ATTEST:		CLERK-MAGISTRATE / ASST CLERK X				TOTAL NO. OF PAGES	ON (DATE)




CRIMINAL DOCKET - OFFENSES		DEFENDANT NAME Kevin M Tynan		DOCKET NUMBER 1928CR000118		
COUNT / OFFENSE 1 B&E BUILDING NIGHTTIME FOR FELONY c266 §16				DISPOSITION DATE AND JUDGE 2-28-20 Vrc601		
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input checked="" type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and alien warning pursuant to C278§29D and MRCrP12 <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
		HEAD INJURY ASMT	RESTITUTION	V/W ASSESSMENT <i>waived</i>	BATTERER'S FEE	OTHER
		SENTENCE OR OTHER DISPOSITION <input checked="" type="checkbox"/> Sufficient facts found but continued without a finding until: 8-27-21 <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by: <div style="text-align: right; font-size: 1.2em;"><i>PO for record</i></div>				
FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input checked="" type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE Paul M. V. Tynan	DATE 6/5/2021	
COUNT / OFFENSE 2 VANDALIZE PROPERTY c266 §126A				DISPOSITION DATE AND JUDGE 2-28-20 Vrc601		
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input checked="" type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and alien warning pursuant to C278§29D and MRCrP12 <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
		HEAD INJURY ASMT	RESTITUTION	V/W ASSESSMENT	BATTERER'S FEE	OTHER
		SENTENCE OR OTHER DISPOSITION <input checked="" type="checkbox"/> Sufficient facts found but continued without a finding until: 8-27-21 <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:				
FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input checked="" type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE Paul M. V. Tynan	DATE 6/5/2021	
COUNT / OFFENSE				DISPOSITION DATE AND JUDGE		
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and alien warning pursuant to C278§29D and MRCrP12 <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
		HEAD INJURY ASMT	RESTITUTION	V/W ASSESSMENT	BATTERER'S FEE	OTHER
		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:				
FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE	DATE	



CRIMINAL DOCKET DOCKET ENTRIES		DEFENDANT NAME Kevin M Tynan	DOCKET NUMBER 1928CR000118
DATE	DOCKET ENTRIES		
5-1-20	motion to refuse to revoke filed no action - see motion KABER		
4-21-20	Defendant's Motion to be Declared Indigent filed and ALLOWED. Verbal JT		
3-29-2021	Request From FTR For CD OF Hearing		
6-11-2021	appearance for post conviction filed by Attorney Matteson		
6-15-2021	Court granting its discretion of granting Promotion on count 1 & 2 (b)(1) court denies defendant's motion for funds for private investigator KABER		
6-28-21	Defendant's Renewed Motion for Funds for Private Investigator filed. Scheduled for virtual hearing on 7-9-21 at 2:00 pm.		
7-9-21	After hearing, Defendant's Renewed Motion for Funds for Private Investigator is ALLOWED. Verbal O		
APPROVED ABBREVIATIONS ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate DFTA = Defendant failed to appear & was defaulted WAR = Warrant Issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing.			

CRIMINAL DOCKET DOCKET ENTRIES		DEFENDANT NAME Kevin M Tynan	DOCKET NUMBER 1928CR000118
DATE	DOCKET ENTRIES		
5/31/22	Defendants Motion to Withdraw Admissions to Sufficient Facts Filed by Attorney Matteson Hearing on Motion Scheduled For 7/8/2022 C 11:00 Am via Zoom		
7-8-22	C to 7-27-22 at 11:00am via Zoom for hearing on Motion to Withdraw Admissions to Sufficient Facts. Vubel V		
7/27/22	C to 9/21/22 For Motion Vubel		
9-21-22	Hearing to determine if an evidentiary hearing is necessary of motion to withdraw admissions to sufficient facts argued. Hodge for Commonwealth. After hearing, taken under advisement. C to 12-21-22 for decision/status Vubel		
11-21-22	Judge docket's memorandum and order on Defendant's motion to withdraw admissions to sufficient facts - denied C to 12-21-22 for status Vubel		

APPROVED ABBREVIATIONS
 ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review
 SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate
 DFTA = Defendant failed to appear & was defaulted WAR = Warrant issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing.

Date/Time Printed: 06-21-2022 10:46:12

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CRIMINAL DOCKET		DOCKET NUMBER 1928CR000119		NO. OF COUNTS 5	Trial Court of Massachusetts District Court Department		
DEFENDANT NAME AND ADDRESS Kevin M Tynan 27 Wall Street Apt #3 North Adams, MA 01247			DOB 08/26/1981	GENDER Male	COURT NAME & ADDRESS Northern Berkshire District Court 111 Holden Street North Adams, MA 01247-0746		
			DATE COMPLAINT ISSUED 02/07/2019				
			PRECOMPLAINT ARREST DATE		INTERPRETER REQUIRED		
FIRST FIVE OFFENSE COUNTS							
COUNT	CODE	OFFENSE DESCRIPTION	OFFENSE DATE				
1	266/16/A	B&E BUILDING NIGHTTIME FOR FELONY c266 §16	11/19/2018				
2	266/126A	VANDALIZE PROPERTY c266 §126A	11/19/2018				
3	266/126A	VANDALIZE PROPERTY c266 §126A	11/19/2018				
4	266/126A	VANDALIZE PROPERTY c266 §126A	11/19/2018				
5	266/20/A	LARCENY FROM BUILDING c266 §20	11/19/2018				
DEFENSE ATTORNEY Flannery			OFFENSE CITY/TOWN Clarksburg		POLICE DEPARTMENT CLARKSBURG PD		
DATE & JUDGE		DOCKET ENTRY		DATE & JUDGE		FEES IMPOSED	
12-18-19 Reta		<input type="checkbox"/> Attorney appointed (SJC R. 3:10) <input type="checkbox"/> Atty denied & Deft. Advised per 211 D §2A <input type="checkbox"/> Waiver of Counsel found after colloquy Terms of release set: <input type="checkbox"/> PR <input checked="" type="checkbox"/> Bail 1000 / 10000 <input type="checkbox"/> See Docket for special condition <input type="checkbox"/> Held (276 §58A)				Counsel Fee (211D § 2A ¶2) <input type="checkbox"/> WAIVED	
						Counsel Contribution (211D § 2) <input type="checkbox"/> WAIVED	
						Default Warrant Fee (276 § 30 ¶1) <input type="checkbox"/> WAIVED	
12-18-19 Reta		Arraigned and advised: <input checked="" type="checkbox"/> Potential of bail revocation (276 §58B) <input type="checkbox"/> Right to bail to review (276 §58) <input type="checkbox"/> Right to drug exam (111E § 10) <input type="checkbox"/> Inquiry made by Court under 276 § 56A Abuse Allegation: <input type="checkbox"/> C276 § 56A form filed by Commonwealth <input type="checkbox"/> Allegation of abuse under C276 § 56A found <input type="checkbox"/> No allegation of abuse under C276 § 56A found				Default Warrant Arrest Fee (276 § 30 ¶2) <input type="checkbox"/> WAIVED	
						Probation Supervision Fee (276 § 87A) <input type="checkbox"/> WAIVED	
						Bail Order Forfeited	
						Advised of right to jury trial: <input type="checkbox"/> Waiver of jury found after colloquy <input type="checkbox"/> Does not waive	
						Advised of trial rights as pro se (Dist. Ct. Supp.R.4)	
						Advised of right of appeal to Appeals Ct. (M.R. Crim P.R. 28)	
SCHEDULING HISTORY							
NO.	SCHEDULED DATE	EVENT	RESULT			JUDGE	TAPE START/ STOP
1	2/8/19	Warrant	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
2	12-18-19	arr	<input checked="" type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd			Reta	
3	1-10-20	PT	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
4	1-24-20	PT	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd			Wraabe	
5	2-28-20	PT	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
6			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
7			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
8			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
9			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
10			<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
APPROVED ABBREVIATIONS ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate DFTA = Defendant failed to appear & was defaulted WAR = Warrant Issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing.							
A TRUE COPY ATTEST:		CLERK-MAGISTRATE / ASST CLERK X			TOTAL NO. OF PAGES		ON (DATE)



CRIMINAL DOCKET - OFFENSES		DEFENDANT NAME Kevin M Tynan		DOCKET NUMBER 1928CR000119	
COUNT / OFFENSE 1 B&E BUILDING NIGHTTIME FOR FELONY c266 §16				DISPOSITION DATE AND JUDGE 2-28-20 Vrabol	
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input checked="" type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and alien warning pursuant to C278§29D and MRCrP12 <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT HEAD INJURY ASMT RESTITUTION VW ASSESSMENT		SURFINE COSTS OUI §24D FEE OUI VICTIMS ASMT BATTERER'S FEE OTHER	
		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:			
FINDING <input checked="" type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated; defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE RSAT	
DATE 18 months HOC 84 days credit					
COUNT / OFFENSE 2 VANDALIZE PROPERTY c266 §126A				DISPOSITION DATE AND JUDGE 2-28-20 Vrabol	
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input checked="" type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and alien warning pursuant to C278§29D and MRCrP12 <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT HEAD INJURY ASMT RESTITUTION VW ASSESSMENT		SURFINE COSTS OUI §24D FEE OUI VICTIMS ASMT BATTERER'S FEE OTHER	
		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:			
FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input checked="" type="checkbox"/> Probation terminated; defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE 8-27-21	
DATE 6/15/2021					
COUNT / OFFENSE 3 VANDALIZE PROPERTY c266 §126A				DISPOSITION DATE AND JUDGE 2-28-20 Vrabol	
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input checked="" type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and alien warning pursuant to C278§29D and MRCrP12 <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT HEAD INJURY ASMT RESTITUTION VW ASSESSMENT		SURFINE COSTS OUI §24D FEE OUI VICTIMS ASMT BATTERER'S FEE OTHER	
		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:			
FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated; defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE 8-27-21	
DATE 6/15/2021					



CRIMINAL DOCKET - OFFENSES		DEFENDANT NAME Kevin M Tynan		DOCKET NUMBER 1928CR000119	
COUNT / OFFENSE 4 VANDALIZE PROPERTY c266 §126A			DISPOSITION DATE AND JUDGE 2-28-20 Vocab		
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or Admission to Sufficient Facts accepted after colloquy and alien warning pursuant to C278§29D and MRCrP12 <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT SURFINE COSTS HEAD INJURY ASMT RESTITUTION VW ASSESSMENT BATTERER'S FEE OTHER		SENTENCE OR OTHER DISPOSITION <input checked="" type="checkbox"/> Sufficient facts found but continued without a finding until: 8/27/2021 <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:	
FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input checked="" type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE DATE Paul N. Nigam 6/5/2021	
COUNT / OFFENSE 5 LARCENY FROM BUILDING c266 §20			DISPOSITION DATE AND JUDGE 2-28-20 Vocab		
DISPOSITION METHOD <input checked="" type="checkbox"/> Guilty Plea or Admission to Sufficient Facts accepted after colloquy and alien warning pursuant to C278§29D and MRCrP12 <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT SURFINE COSTS HEAD INJURY ASMT RESTITUTION VW ASSESSMENT BATTERER'S FEE OTHER		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:	
FINDING <input checked="" type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause		FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)		JUDGE DATE 18 months + 100- concurrent with CT 1	
COUNT / OFFENSE			DISPOSITION DATE AND JUDGE		
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or Admission to Sufficient Facts accepted after colloquy and alien warning pursuant to C278§29D and MRCrP12 <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)		FINE/ASSESSMENT SURFINE COSTS HEAD INJURY ASMT RESTITUTION VW ASSESSMENT BATTERER'S FEE OTHER		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:	
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CRIMINAL DOCKET DOCKET ENTRIES		DEFENDANT NAME Kevin M Tynan	DOCKET NUMBER 1928CR000119
DATE	DOCKET ENTRIES		
8-1-20	motion to reuse & revoke AR&A - no action - see motion WRAR		
9-21-20	Defendant's Motion to be Declared Indigent Filed and ALLOWED. V. Sol. J.		
3-29-2021	PTR request for Hearing on 12/18/19 Filed by Attorney Matheson		
6-11-2021	Appearance Filed by Attorney Matheson For Post Conviction		
6-15-2021	Ct. Exercising its DISCRETION AND TERMINATING Proceeding on cases 2, 3, & 4. (Cm) Court denies defendant's motion for private investigator name		
6-28-21	Defendant's Renewed Motion for Funds for Private Investigator filed. Scheduled for virtual hearing on 7-9-21 at 2:00 pm.		
7-9-21	After Hearing, Defendant's Renewed Motion for Funds for Private Investigator is ALLOWED. V. Sol. J.		
APPROVED ABBREVIATIONS ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate DFTA = Defendant failed to appear & was defaulted WAR = Warrant Issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing.			

CRIMINAL DOCKET DOCKET ENTRIES		DEFENDANT NAME Kevin M Tynan	DOCKET NUMBER 1928CR000119
DATE	DOCKET ENTRIES		
5/31/22	Defendants motion to withdraw Admissions to Sufficient Facts Filed by Attorney Matteson. Hearing on motion Scheduled For 7/8/2022 @ 11:00 AM via Zoom.		
7-27-22	C to 9-21-22 for motion UNABOQ		
9-21-22	Hearing to determine if an evidentiary hearing is necessary on motion to withdraw admissions to sufficient fact argued. Hodge for commonwealth. After hearing, taken under advisement C to 12-21-22 for decision/status UNABOQ		
11-21-22	Judge docket's Memorandum and order on Defendant's motion to withdraw admissions to sufficient facts - motion denied. C to 12-21-22 for status UNABOQ		
11/28/2022	Notice of appeal on Judges Denial of motion to withdraw Admission to Sufficient Facts Filed by Attorney Matteson		
1/17/23	PDF of Transcript Filed via Email.		

APPROVED ABBREVIATIONS

ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review
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 DFTA = Defendant failed to appear & was defaulted WAR = Warrant issued WARD = Default warrant issued WR = Warrant or default warrant recalled PVH = probation revocation hearing.

Date/Time Printed: 06-21-2022 11:44:16



1928CR000119

Version 2.0 - 11/06

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT

BERKSHIRE, SS

NORTHERN BERKSHIRE DISTRICT COURT

DOCKET NO.: 1928CR118

DOCKET NO.: 1928CR119

COMMONWEALTH

VS.

KEVIN M. TYNAN

MEMORANDUM AND ORDER

ON

DEFENDANT'S MOTION TO WITHDRAW ADMISSIONS TO SUFFICIENT FACTS

In Docket Number 1928CR118 the defendant was prosecuted in this court for one count of breaking and entering a building in the nighttime with intent to commit a felony (G.L. c. 266, § 16) and one count of vandalism (G.L. c. 266, §126A). These crimes were alleged to have occurred in Clarksburg on November 11, 2018. In Docket Number 1928CR119 the defendant was prosecuted in this court for one count of breaking and entering a building in the nighttime with intent to commit a felony (G.L. c. 266, § 16) , threes count of vandalism (G.L. c. 266, §126A), and one count of larceny from a building (G.L. c. 266, § 20). These crimes were alleged to have occurred in Clarksburg on November 19, 2018. ¹

The defendant appeared before me on February 28, 2020 and tendered pleas on the aforementioned charges. In Docket Number 1928CR118 both charges were continued without findings of guilty and were ultimately dismissed on June 15, 2021. In Docket Number 1928CR119 the defendant was sentenced to 18 months to the House of Corrections on the

¹ The crimes committed in Clarksburg (breaking- in to schools) were similar to those committed by the defendant at about the same time in Vermont and New York.

breaking and entering charge , the three vandalism counts in that docket were continued without findings of guilt and were ultimately dismissed on June 15, 2021 and on the larceny from a building charge he was sentenced to a concurrent 18- month sentence.

On May 31, 2022 the defendant, represented by new counsel, Attorney Nicholas Matteson, filed a motion to withdraw the pleas in both dockets entered before me on February 20, 2022.² The defendant alleged two discrete reasons why he should be allowed to withdraw these guilty pleas: (1) That his former attorney, Lee D. Flournoy, provided him with ineffective assistance of counsel by failing to file a motion to suppress evidence; and (2) That Attorney Flournoy's inaccurate prediction of his parole eligibility invalidates his pleas.

On September 21, 2022 the defendant's motion to withdraw his pleas came before me for hearing. The defendant was represented by Attorney Matteson. Assistant District Attorney Natalie Hoch represented the Commonwealth. The court heard arguments from counsel; both attorneys were extremely well-prepared and presented their respective arguments in a thorough and logical manner.

Following the conclusion of the September 21, 2022 hearing I took the defendant's motion under advisement. I have since read the defendant's motion for new trial, supporting legal memorandum and the documents contained in the voluminous appendix in support of his motion.³ I have read Commonwealth's written opposition to the defendant's motion. I commend both lawyers on the exceptional quality of their written work product.⁴ I have also read the police reports contained within each docket.

² A motion to vacate an admission to sufficient facts is treated as a motion for a new trial. **Commonwealth v. Muniur M.**, 467 Mass. 1010, 1011 (2014).

³ Among other documents, the appendix contains affidavits of both the defendant and Attorney Flournoy.

⁴ The court has concluded that an evidentiary hearing would not add anything to the information that has been presented in the defendant's motion, affidavits and materials contained in his appendix. **Commonwealth v. Goodreau**, 442 Mass. 341 (2004). See **Commonwealth v. DeVincent**, 421 Mass. 64, 68 (1995). The Commonwealth's opposition does not directly challenge the "facts" that form the basis of the defendant's motion but argues that legally those "facts" do not warrant the relief sought by him.

Pursuant to Mass. R. Crim. P. 30(b):

The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

A motion to withdraw a guilty plea is treated as a motion for a new trial under Mass. R. Crim. P. 30 (b), see **Commonwealth v. Scott**, 467 Mass. 336, 344 (2014), and like a motion for a new trial after a guilty verdict may be granted only "if it appears that justice may not have been done," Mass. R. Crim. P. 30 (b). Judges are to apply the rule 30 (b) standard "rigorously, and should only grant a post sentence motion to withdraw a plea if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth." **Commonwealth v. Wallace**, 92 Mass. App. Ct. 7, 10 (2017), quoting **Commonwealth v. Fanelli**, 412 Mass. 497, 504 (1992). The defendant bears the burden of proof on a motion to withdraw a plea. **Commonwealth v. Marinho**, 416 Mass. 115, 123 (2013). A collateral challenge to a prior conviction by guilty plea, "if it is to advance at all, must be accompanied by sufficient credible and reliable evidence to rebut a presumption that the prior conviction was valid." **Commonwealth v. Lopez**, 426 Mass. 657, 664-665 (1998).

The defendant bears the burden of proof when claiming entitlement to a new trial based on ineffective assistance of counsel. See **Commonwealth v. Kolenovic**, 471 Mass. 664, 673 (2015). The Sixth and Fourteenth Amendments to the Constitution of the United States and Article 12 of the Declaration of Rights of the Commonwealth of Massachusetts guarantee defendants charged with criminal offenses the effective assistance of counsel. **Strickland v. Washington**, 466 U.S. 668, 690 (1984); **Commonwealth v. Fuller**, 394 Mass. 251 (1985). It is "something less than a guarantee of a perfect defense; rather it is to insure a fair trial." **Commonwealth v. McGann**, 20 Mass. App. Ct. 59, 61 (1985). In order to qualify for a new trial on these grounds, the defendant must demonstrate a "serious incompetency, inefficiency, or inattention of counsel-behavior falling measurably below that which might be expected from the ordinary fallible lawyer, and, if

that is found, then typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defense.” **Commonwealth v. Saferian**, 366 Mass. 89, 96 (1974). The latter requirement has been described as requiring some showing that better work might have been accomplished something material for the defense. **Commonwealth v. Satterfield**, 373 Mass. 109, 115 (1977).

In evaluating plea counsel’s performance, judicial scrutiny must be deferential. **Strickland v. Washington**, *supra* at 689. Counsel’s failings must be so grave, so fundamental, that “the [plea] cannot be relied on as having produced a just result.” *Id.*, at 686. A defendant bears a heavy burden in establishing ineffective assistance of counsel of such magnitude that he is entitled to a new trial. **Commonwealth v. Brookins**, 33 Mass. App. Ct. 626, 631 (1992). Moreover, “[j]udicial scrutiny of counsel’s performance must be highly deferential, indulg[ing] a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” **Commonwealth v. Florentino**, 396 Mass. 689, 690 (1986).

When a lawyer’s tactical or strategic judgment in handling a case in a particular manner is called into question, the lawyer’s judgment must be “manifestly unreasonable” in order to find ineffective assistance of counsel. **Commonwealth v. White**, 409 Mass. 266, 272 (1991), quoting **Commonwealth v. Adams**, 374 Mass. 722, 728 (1978). Courts should generally give some deference to the lawyer’s judgment. **Commonwealth v. White**, *supra* at 272. Further, a review of a tactical or strategic judgment is not made with “the advantage of hindsight,” and an alleged violation of a lawyer’s duty must be “both substantial and prejudicial” to constitute ineffective assistance of counsel. **Commonwealth v. Levia**, 385 Mass. 345, 353 (1982) (citations omitted).

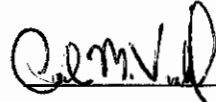
For the reasons set forth in the Commonwealth’s memorandum, at pages 12-21, I rule that the defendant’s pleas should not be vacated because of the failure of Attorney Flournoy to file a motion to suppress. I agree with the Commonwealth that any motion to suppress the observations of Sergeant Zoito when he walked down the shared driveway and looked into the shared garage would not have succeeded. I also agree with the Commonwealth that even if a motion to

suppress had been allowed, the remaining direct and circumstantial evidence against the defendant would have been sufficient to allow these matters to proceed to trial. In my judgment, the Commonwealth's cases against him, although largely circumstantial, were strong; the manner in which he committed the crimes in Vermont and New York would also have served to identify him as the perpetrator of the crimes in Clarksburg, only serving to buttress the Commonwealth's cases against him.

For the reasons set forth in the Commonwealth's memorandum, at pages 21-24, I rule that the defendant's pleas should not be vacated because of Attorney Flournoy's statements to him regarding parole eligibility. In reality, the defendant received a more favorable overall sentence than was advocated by Attorney Flournoy and the Commonwealth. Instead of incarcerating the defendant for two and half years (30 months) with 18 months to be served with the balance suspended with numerous probationary conditions as his attorney advocated, the court sentenced him on two counts in Docket Number 1928CR119 to concurrent 18 months sentences, with no probation. The court also spared him convictions on the remaining charges in both dockets. It is well-settled that a guilty plea is not necessarily regarded as having been made involuntarily or unintelligently because a defendant has received inaccurate or incomplete advice from his counsel concerning the collateral consequences of the plea. Mistaken advice as to parole eligibility has long been held not to vitiate the basis for a plea. See generally, **Commonwealth v. Indelicato**, 40 Mass. App. Ct. 944, 945 (1996). Moreover, as the Commonwealth points out, since the defendant had warrants for his arrest outstanding from the State of Vermont lodged at the Berkshire County House of Correction while he was serving his 18 month sentence (see Docket Number 2128CR30) it would have been unreasonable for him to expect that he would have been released, that is "paroled" into the community, without having first dealt with the cases in Vermont.

For the reasons stated above, the defendant's motion for a new trial is **DENIED**.

Date: November 21, 2022

A handwritten signature in black ink, appearing to read "P. M. Vrabel", written over a horizontal line.

Paul M. Vrabel

Justice of the District Court

